CHIN KOK WOO & ORS v. SKY PARK PROPERTIES SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ARIEF EMRAN ARIFIN JC
[SUIT NO: WA-22NCVC-192-03-2021]
7 JANUARY 2022

Abstract – *The Housing Development (Control and Licensing) Act 1966 is a piece of social legislation intended to protect purchasers. This does not however mean that the court should disregard any settlement agreement that has been executed between the purchasers and developers to finalise the liquidated ascertained damages claimable by the former, as such agreements are not prohibited by law. In the final analysis, the court should not merely protect purchasers but should also prevent any attempt to re-open litigation that has been fully litigated or settled amicably.*

CIVIL PROCEDURE: *Striking out – Application for – Claim by purchasers of units of development against developer and architect of project and owner of land – Allegation of failure to deliver vacant possession and certificate of completion and compliance – Whether claimants' statement of claim disclosed reasonable cause of action – Whether scandalous, frivolous or vexatious – Whether abuse of process of court – Whether claim unsustainable – Whether claim should be struck out – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)*

TORT: *Unlawful interference – Claim – Claim by purchasers of units of development against architect of project – Allegation of failure to deliver vacant possession and certificate of completion and compliance – Allegation that architect only issued partial certificate of completion and compliance via Form F1 – Whether issuance of Form F1 wrong – Whether architect negligent and guilty of unlawful interference of contract by developer of project – Whether there were damages suffered because of alleged breach of duty by architect*

LAND LAW: *Vacant possession – Delivery – Claim by purchasers of units of development against developer and architect of project and owner of land – Allegation of failure to deliver vacant possession and certificate of completion and compliance – Whether vacant possession not delivered as alleged by purchasers – Parties entered into settlement agreements – Whether settlement agreements binding on parties – Whether purchasers barred from making further claims relating to late delivery of units*

The plaintiffs were purchasers of units at the development known as Skypark @ Cyberjaya. The first defendant was the developer of the project, the second defendant was the owner of the land and the third defendant was the architect of the project. The plaintiffs and the first and second defendants had entered

into sale and purchase agreements ('SPA'). The plaintiffs alleged that: (i) the first and second defendants failed to deliver vacant possession and certificate of completion and compliance ('CCC'); (ii) the third defendant only issued Form F1 *ie*, partial CCC and not a Form F *ie* a full CCC. The issuance of Form F1 by the third defendant was wrong and as a result, the third defendant had acted negligently and was guilty of unlawful interference of the contract by the first defendant; (iii) they were entitled to claim for liquidated ascertained damages against the first and second defendants from the date of booking of the purchase of the property to the date of issuance of the CCC *ie* the date Form F was issued; and (iv) the strata title should be issued to enable them to set up the management corporation as well as to enable them to sell their properties to third parties. Therefore, the plaintiffs sought the second defendant to deliver the strata title within three months from the date of the orders of the court. There were three applications before this court, namely applications to strike out by the first defendant ('encl. 16'), the second defendant ('encl. 20') and the third defendant ('encl. 22') based on O. 18 r. 19(1)(a), (b) or (d) of the Rules of Court 2012. In all three applications, the defendants alleged that the plaintiffs' statement of claim either (i) did not disclose a reasonable cause of action; (ii) was scandalous, frivolous or vexatious; or (iii) was an abuse of process of the court. At the hearing of the applications by the defendants, the plaintiffs conceded that the first, second, sixth, seventh, 15th, 16th, 17th and 19th plaintiffs did not have valid claims against the first defendant because they had commenced claims against the said two defendants before the Housing Tribunal.

Held (allowing encls. 16, 20 and 22):

(1) The first, second, sixth, seventh, 15th, 16th, 17th and 19th plaintiffs were not entitled to pursue the claim against the first defendant further. Having started proceedings before the Housing Tribunal and finalising the said claim in those proceedings, the said plaintiffs could not pursue any further claims against the first defendant. The claim by the said plaintiffs was struck out. (paras 24 & 84)

(2) One of the essential elements critical to have a complete cause of action in negligence was the existence of damages suffered because of the breach of duty by the defendants. Having failed to identify and plead in the statement of claim the special damages that should be paid by the third defendant that they alleged arose as a result of the failure of the said defendant to exercise his alleged duty of care to the plaintiffs was fatal. The pleaded case had not shown a complete cause of action in negligence that was maintainable in law against the defendant. Further, the SPA and Schedule H of the Housing Development (Control and Licensing Act) 1966 ('Act') had provided for the specific remedies for late delivery actionable by the plaintiffs against the developers. Therefore, it could

not be said that there existed any statutory cause of action for late delivery or failure to deliver Form F or issuance of any CCC by the architect that was recognised or created by the statute. The applicable legislation and regulation created thereunder have made specific provisions for liquidated ascertained damages payable by the developer for any late delivery of a unit sold by a developer licensed under the Act. To impose such tortious obligations would mean that this court would be creating new obligations that were not intended by Parliament or by the Minister empowered under the said legislation. (paras 29-31)

(3) With regard to the claim for unlawful interference with the contract, the plaintiffs failed to plead a complete cause of action for the tort. The third defendant was entitled to issue a Form F1 in accordance with its duties under the Street, Drainage and Building Act 1974, Selangor Uniform Building By-Laws 1986 ('UUBKS'). The third defendant had produced the required Forms G1 to G2 and all supporting documents. The third defendant had shown that Form F1 was issued in accordance with statutory provisions and that they had acted lawfully in accordance with their obligations under the relevant statutory provisions. It was not for the plaintiffs to dictate the required form that should be issued by the architect, the third defendant, as that would be contrary to the statute and defeat the purpose of having him exercise his duties to ensure that the project was safe and sound for occupation by the intended purchasers. There was no form of any wrong undertaken by the third defendant that merited a claim for the tort of unlawful interference with contract as alleged by the plaintiffs. The third defendant had acted in accordance with the applicable law. (paras 35, 37, 39 & 40)

(4) According to the plaintiffs, the term for the delivery of the contract should be 36 months instead of 54 months. However, it must be noted that the SPA had incorporated an extension of time of 54 months at the time the agreement was executed with the approval of the Housing Controller. The Housing Controller had granted the amendment to the SPA even before the contract was concluded with any of the purchasers. The plaintiffs could not claim that the extended time frame as agreed under the SPA was unlawful and not applicable to them. Simply put, the time frame for delivery was 54 months, as provided in cl. 25 of the SPA. This was made in accordance with reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989. (paras 44, 45, 46 & 50)

(5) The plaintiffs and the defendants had earlier entered into settlement agreements. These settlement agreements were binding on parties and therefore, barred the plaintiffs from making any further claims relating to the late delivery of the units. (paras 53 & 58)

(6) Although a developer is only entitled to deliver vacant possession when a CCC is issued and not when there is a partial completion, the documents produced in the affidavits indicated that vacant possession was delivered to the plaintiffs by the first defendant. What was important was that the principal submitting person *ie*, the architect in question (the third defendant) must certify that: (i) all the technical conditions imposed by the local authority had been complied with; (ii) Forms G1 to G2 had been duly received by him and duly certified; (iii) all electrical services, access roads and all requirements thereunder have been provided; and (iv) he certified that the building had been constructed and completed to the best of his knowledge in accordance with the Act, applicable laws and the approved plans. The first defendant had shown that although the title to the form used was Form F1, the architect had certified that Menara Tower 1 was built in accordance with the requirements of by-laws 25 to 28 of the UUBKS. He had certified that the building was fit and ready for occupation. Forms G1 to G21 were reproduced by the first and third defendants with all the necessary documents showing water, electricity and access to the building had been provided. Even in the form utilised by the architect, he had indicated that Block Menara 1 (service apartment) 44 Tingkat 319 unit was safe and fit for occupation in accordance with the UUKBS. (paras 63, 67 & 69)

(7) Vacant possession was provided to the plaintiffs as the joint management body had been set up. This was endorsed by the Sepang Municipal Council, in accordance with s. 17 of the Strata Management Act 2013. If vacant possession was not delivered, the developer was not entitled to set up a joint management body and the local authority would not have allowed such a body to be set up. Further, s. 25(3) of the SPA stated that '… any cause of action to claim liquidated damages by the purchaser under this clause shall accrue on the date the purchaser takes vacant possession of the said parcel'. Given the said clause, if indeed that vacant possession was not given to the plaintiffs, then they did not have the right to institute any proceedings yet for late delivery. The right for the plaintiffs to institute their claim for liquidates damages only arose when vacant possession was given to them and not before then. As they themselves were attempting to re-open the issue of late delivery that they had either ventilated before the Housing Tribunal or had earlier settled, they surely admitted that vacant possession of the premises or unit they bought had been given. They could not blow hot and cold at the same time. (paras 71-73)

(8) The second defendant was not liable to the plaintiffs for the claims that were instituted in this proceeding. The obligation to deliver the property within the contractual time frame under the SPA laid with the first

defendant and not the second defendant. The remedies claimed by the plaintiffs in this suit were solely against the first defendant. No specific remedy was prayed against the second defendant, thus indicating that there was no complete cause of action against the second defendant. (para 80)

(9) The plaintiffs' claim against the first to third defendants should be struck out as it was plainly unsustainable, frivolous, vexatious and constituted an abuse of process. (paras 42, 76 & 83)

Case(s) referred to:

Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors [2022] 1 CLJ 120 HC ***(refd)***

Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals [2020] 1 CLJ 162 FC ***(dist)***

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon [2003] 1 CLJ 585 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Eng Mee Yong v. Letchumanan [1979] 1 LNS 18 ***(refd)***

Leong Keng Chiang v. Prema Bonanza Sdn Bhd [2021] 1 LNS 659 HC ***(refd)***

Loh Holdings Sdn. Bhd. v. Peglin Development Sdn Bhd & Anor [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 FC ***(refd)***

Lok Kok Beng & Ors v. Loh Chiak Eong & Anor [2015] 7 CLJ 1008 FC ***(refd)***

Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases [2021] 10 CLJ 596 HC ***(refd)***

OM Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd [2018] 5 CLJ 587 CA ***(refd)***

Pinpoint Consortium (M) Sdn Bhd v. Mammoth Empire Land Sdn Bhd [2020] 5 CLJ 281 HC ***(refd)***

PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals [2021] 2 CLJ 441 FC ***(refd)***

Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors [2012] 1 CLJ 75 CA ***(refd)***

Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors [2021] 10 CLJ 1 FC ***(refd)***

Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal [2021] 10 CLJ 206 FC ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss. 3, 24, Schedule H
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (3)
Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)
Selangor Uniform Building By-Laws 1986, by-laws 25, 27, 28
Strata Management Act 2013, s. 17

For the plaintiff - Ranjan Chandran & Nandhini Devi Nagaindran; M/s Hakem Arabi & Assocs

For the 1st & 2nd defendants - Justin Voon, Alvin Lai & Lin Pei Sin Peg; M/s Justin Voon Chooi & Wing

For the 3rd defendant - Tabian Tahir & Nabila Jamaludin; M/s Ho-Noecker & Pragasam

Reported by Lina E

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JUDGMENT

Mohd Arief Emran Arifin JC:

Background Facts

B **[1]** The plaintiffs are purchasers of units at the development known as Skypark @ Cyberjaya that is built on the piece of land held under master title bearing number Geran 311346, Lot 47336, Mukim Dengkil, Daerah Sepang, Negeri Selangor.

[2] The first defendant is the developer of the said project. The second defendant is the owner of the said land.

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[3] The third defendant is the architect of the said project and is responsible for the same practising in the name of MDP Studio Sdn Bhd.

[4] The plaintiffs and the first and second defendant had entered into each separate sale and purchase agreement with the plaintiffs on various dates.

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[5] The plaintiffs alleged that the first and second defendants had failed to deliver vacant possession pursuant to the terms of the agreement.

[6] The plaintiffs further contend that there was no valid vacant possession given to them as they alleged that the defendants did not deliver a valid certificate of completion and compliance (CCC).

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[7] The plaintiffs also contend that they are entitled to claim liquidated ascertained damages against the first and second from the date of booking of the purchase of the property to the date of issuance of the CCC. The plaintiffs rely on cl. 11,25.1, cl. 25.2m, cl. 26, cl. 27.2, and cl. 28 of the sale and purchase agreements as well as Schedule H of the Housing Development (Control and Licensing) Act 1966.

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[8] The plaintiff also relies on the recent decision of the Federal Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 and *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441.

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[9] The plaintiffs contend as the third defendant had only issued a Form F1, *ie*, a partial CCC and not a Form F, *ie*, a full CCC, therefore, there was no vacant possession was delivered to them.

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[10] Therefore, the plaintiffs believe that they are entitled to claim liquidated ascertained damages until the date Form F is issued to them and CCC delivered in full.

[11] The plaintiffs also seek the second defendant to deliver the strata title to the properties within three months from the date of the orders to be made by this court. They allege that strata title should be issued to enable them to set up the management corporation as well to enable them to sell their properties to third parties.

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[12] The plaintiffs' claim against the third defendant is based on the alleged failure by the architect to issue the Form F. The plaintiffs allege that the issuance of Form F1 by the third defendant is wrong and as a result, the said defendant had acted negligently and is guilty of unlawful interference of the contract by the first defendant. The claim against the third defendant is seen at paras. 66 to 71 of the statement of claim.

[13] However, during the course of the hearing of the applications filed by the defendants, counsel for the plaintiffs helpfully admits that the vacant possession of the properties at issue was delivered to the plaintiffs on 2 July 2018. The only issue is whether CCC was delivered in accordance with the agreement and as required under applicable law. Counsel does not deny that vacant possession was delivered to the plaintiffs on 2 July 2018. Counsel for the plaintiffs also admits that no form of damages was claimed against the third defendant in the claim.

Pending Applications Before This Court

[14] There are three applications before this court:

(i) enclosure 16 - Application to strike out by the first defendant;

(ii) enclosure 20 - Application to strike out by the second defendant; and

(iii) enclosure 22 - Application to strike out by the third defendant.

The applications before this court are premised on O. 18 r. 19(1)(a), (b), or (d) of the Rules of Court 2012.

[15] I reproduce the O. 18 r. 19 of the Rules of Court 2012:

> **19. Striking out pleadings and endorsements (O. 18 r. 19)**
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> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court,
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under subparagraph (1)(a).
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> (3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[16] As I have alluded earlier, the defendants allege that the statement of claim either (i) does not disclose a reasonable cause of action or (ii) it is scandalous, frivolous, or vexatious, or (iii) it is an abuse of process of the court.

[17] The applicable law in this area is trite and has been explained in the decisions of the courts in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7, *Sivarasa Rasiah & Ors v. Che Hamzah Che Ismail & Ors* [2012] 1 CLJ 75 and *OM Cahaya Mineral Asia Bhd v. Damansara Realty (Pahang) Sdn Bhd* [2018] 5 CLJ 587.

[18] I make specific reference to the judgment of the Malaysian courts in *Sivarasa Rasiah v. Che Hamzah Che Ismail* (*supra*) and *Bandar Builder Sdn Bhd v. United Malayan Banking Corporation Bhd* (*supra*), that if the pleadings disclose a reasonable cause of action and if it could be shown that there are "issues of law that need to be elaborated and argued in great detail and for mature consideration", then this court should not strike out the suit.

[19] I am also aware that this court should also consider if there are relevant factual issues that require deliberation of the facts through witnesses. If there are such issues, this court should not utilise its powers to strike out the claim under O. 18 r. 19 of the Rules of Court 2012.

[20] It is important that I refer to the judgment of Mohd Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14, where His Lordship quoted the judgment of the Privy Council in *Eng Mee Yong v. Letchumanan* [1979] 1 LNS 18, which is reproduced herein:

> Although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

Striking Out the Claim Filed By The First, Second, Sixth, Fifth, Eighth, 15th, 16th, 17th And 19th Plaintiffs Against The First Defendant

[21] I also note that at the hearing of the applications by the defendants, the plaintiffs' counsel conceded that the first, second, sixth, fifth, eighth, 15th, 16th, 17th and 19th plaintiffs do not have a valid claim against the first defendant. This is because, the said plaintiffs had commenced claims against the first and second defendants before the housing tribunal. There were no appeals filed by the said plaintiffs against the decision of the housing tribunal therefore, the plaintiffs' counsel conceded that the issues in this suit against the first defendant are subject to the doctrine of *res judicata*.

[22] I also refer to the decision of the Federal Court in *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206; [2021] 8 AMR 427. A

[23] Hasnah Mohammed Hashim FCJ stated in the above-referred case:

> [29] The law on retrospectivity arose in relation to *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1, Richard Malanjum CJ (Sabah and Sarawak) (as he then was) delivered the decision of this court departed from the earlier legal position and held that in a civil claim, when fraud is alleged, the civil standard of proof is on the balance of probabilities. In the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities. Hence, post-*Sinnaiyah* (*supra*) the standard of proof for fraud in a civil proceeding is on a balance of probabilities. B C
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> [30] The issue on the retrospective application of a decision of the Federal Court case was discussed in the Federal Court decision of *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697. In that case, it was held by the Federal Court that at the material time of the decision in the court below, the standard of proof for fraud in civil proceedings was beyond reasonable doubt. D
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> [31] Therefore, *Sinnaiyah* (*supra*) could not apply in the later decision of this court in *Letchumanan* (*supra*) as the case was filed in 2010 and decided by the trial court in 2013 before the decision in *Sinnaiyah* (*supra*). The Federal Court held that the Court of Appeal had seriously misdirected itself in requiring proof of forgery on the standard of beyond reasonable doubt. Jeffrey Tan FCJ in *Letchumanan* (*supra*) clarified the prospective overruling of law in *Sinnaiyah* (*supra*) as follows: E F
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> > [88] ... There was no departure in *Sinnaiyah* from the common law position when the court said 'we should make it clear that this judgment only applies to this appeal and to future cases and should not be utilised to set aside or review past decisions involving fraud in civil claims'. *The court merely underscored the retrospective and prospective effect of its decision, to apply to that appeal and to future cases, to cases as yet not filed and trials or appeals which have yet to be finally determined, but not to past cases which have reached a terminal end. The ruling in Sinnaiyah was not in the prospective only form. Sinnaiyah* applies to all cases that have not been finally determined, including all pending appeals, except that in the instant appeal, it does not matter. G H
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> [32] Thus, for a decision to be binding retrospectively, the case must still be at the trial stage to enable the parties to prepare and argue their case, be it a plaintiff or defendant, based on the burden of proof applicable at that material time. I
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> (emphasis added)

[24] Based on the said concession and the above authority, I find that the said plaintiffs are not entitled to pursue the claim against the first defendant further. Having started proceedings before the Housing Tribunal and finalising the said claim in those proceedings, then the said plaintiffs cannot pursue any further claims against the first defendant. The decision in *Ang Ming Lee* (*supra*) and *PJD Regency* (*supra*) cannot be used to reopen the dispute that was resolved before the housing tribunal.

Striking Out By The Third Defendant – Enclosure 22

[25] I will first deal with the application to strike out filed by the third defendant.

[26] Firstly, when I peruse the amended statement of claim, in particular, paras. 66 to 71 of the statement of claim, it is clear to me that the claim against the third defendant is premised on the allegation that the said defendant had acted negligently in (i) issuing the Form F1 instead of Form F; and (ii) for unlawful interference with the sale and purchase agreement.

[27] As conceded by counsel for the plaintiffs, they did not plead any special damages against the third defendant, and in paras. 71 and 87(e) of the statement they had only claimed:

> 71. Justeru itu, Plaintif-plaintif menuntut dari Defendan Pertama LAD berterusan hingga Tarikh sebenar pengeluaran "Borang F/CCC oleh Defendan Ketiga projek tersebut yang memperakui bahawa projek tersebut telah dihabiskan selesai selamat dan sesuai untuk diduduki ("fit for occupation"). Walau bagaimanapun, dalam keadaan sedemikian, oleh kerana Plaintif-plaintif tidak pernah melihat CCC, Plaintif terpaksa menuntut LAD yang dikira sehingga Tarikh penfailan tuntutan ini.
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> 87(e). Bahawa Defendan Ke-3 dipertanggungjawab atas gangguan yang tidak sah ("Unlawful Interference") dan/atau ("Kecuaian") kerana telah gagal melaksanakan tugas professional mereka dalam mengeluarkan "Borang F" dan/atau CCC.

[28] There was no form of damages claimed against the third defendant in any part of the amended statement of claim.

[29] It is trite law that one of the essential elements critical to have a complete cause of action in negligence is the existence of damages suffered because of the breach of duty by the defendant. I refer to the decision of the Court of Appeal in *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon* [2003] 1 CLJ 585, where Gopal Sri Ram JCA stated:

> To make out a case against a defendant in the tort of negligence, a plaintiff must establish four ingredients. first, he must show that he was owed a duty by the defendant to take reasonable care. Second, that the defendant breached that duty, third, that the resultant breach caused the harm in question and fourth that he (the plaintiff) suffered damage that is not too remote. There is a tendency on the part of some textbook writers (in the interest of tidiness) to treat each of these elements in

watertight compartments. Such an approach may be quite misleading. This is because what a court trying an action for negligence is concerned with is the interpretation of a particular set of facts as establishing or negativing one or more of the ingredients of the tort. The speeches made in the House in *Woods v. Duncan* [1946] AC 401 illustrates the point.

[30] Therefore, having failed to identify and plead in the statement of claim the special damages that should be paid by the third defendant that they allege arose as a result of the failure of the said defendant to exercise his alleged duty of care to the plaintiffs is fatal. I find that the pleaded case has not shown a complete cause of action in negligence that is maintainable in law against the said defendants.

[31] I also find that as the sale and purchase agreement and Schedule H of the Housing Development (Control and Licensing) Act 1966 has provided for the specific remedies for late delivery actionable by the plaintiffs against the developers, it cannot then be said that there exists any statutory cause of action for late delivery or failure to deliver Form F or issuance of any CCC by the architect that is recognised or created by statute. The applicable legislation and regulations created thereunder have made specific provisions for liquidated ascertained damages payable by the developer for any late delivery of a unit sold by a developer licensed under the Housing Development (Control and Licensing) Act 1966. To impose such tortious obligations would mean that this court will be creating new obligations that were not intended by Parliament or by the Minister empowered under the said legislation.

[32] I am guided by the recent decision of the Federal Court in *Tan Sri Dr Muhammad Shafee Abdullah v. Tommy Thomas & Ors* [2021] 10 CLJ 1, where on the issue of whether a statute creates a right of action enforceable by members of the public, Abdul Rahman Sebli FCJ stated:

[40] It needs to be emphasised that s. 99(1) of the LPA is a special provision that deals specifically with complaints of misconduct by advocates and solicitors whereas s. 64(6) is a general provision that deals generally with motions to be considered at the AGM. Applying the maxim *generalia specialibus non derogant*, s. 64(6) being a general provision must give way to the special provision of s. 99(1). Like any other legislation passed by Parliament, s. 99(1) must be given a construction that will give effect to its object rather than to defeat it.

[41] From a plain reading of the provision, it is clear that Parliament's intention in enacting s. 99(1) was to leave it entirely to the Disciplinary Board to deal with all matters concerning the conduct of advocates and solicitors or pupils, hence the direction in imperative terms that the complaint "shall" in the first place be made or referred to the Disciplinary Board. This is to ensure that the disciplinary process is not contaminated by any premature finding of guilt in whatever form by any other body before the complaint is brought before the Disciplinary Board. There is

A nothing in the LPA that gives the Malaysian Bar the right to place before the floor of the AGM any complaint concerning the conduct of an advocate and solicitor by way of a motion under s. 64(6). In fact, it points in the opposite direction.

[42] It is trite law that where an Act creates an obligation and enforces
B the performance in a specified manner, it must be taken as a general rule that performance cannot be enforced in any other manner: See *Doe D Bishop of Rochester v. Bridges* [1831] 1 B & AD 847 per Lord Tenterden CJ.

[33] Therefore, even if there was late delivery of the property contrary to the terms of sale and purchase agreement and contrary to law, in view of the
C recent decision of the Federal Court in *Ang Ming Lee* (*supra*) and *PJD Regency* (*supra*), the remedies available to the plaintiffs are to institute the appropriate claims against the developer for the said damages. Parliament did not intend or make any such claims maintainable against the architect.

[34] I accept that the architect may have a duty of care in law to the
D plaintiffs as purchasers. This is provided under the common law in instances the architect had acted negligently in designing the building or implemented the project that led to damage suffered by the purchasers. For example, if the design by the architect was so negligent that it led to a disaster or collapse of a building, then a claim may be pursued against the architect. See the
E decision of the Federal Court in *Lok Kok Beng & Ors v. Loh Chiak Eong & Anor* [2015] 7 CLJ 1008 as the existence of such a duty of care is fact sensitive. However, such a duty does not arise based on the pleaded case against the defendant.

[35] With regard to the claim for unlawful interference with the contract,
F I also find that the plaintiffs had failed to plead a complete cause of action for the said tort.

[36] I refer to the decision of Wan Suleiman FJ in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 where His Lordship stated:

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Learned Counsel for the appellant referred us to *Greig v. Insole* [1978] 1 WLR 302 at 333, a passage in which, he submits summarises the law regarding the tort of inducement to breach of contract.

At common law it constitutes a tort for third persons deliberately to interfere in the execution of a valid contract which has been concluded
H between two or more other parties, if five conditions are fulfilled:

There must be (a) "direct" interference or (b) "indirect" interference coupled with the use of unlawful means; per Lord Denning MR in *Torquay Hotel Company Ltd. v. Cousins* [1969] 2 Ch 106, 138.

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As to the meaning of "interference" this is not confined to the actual procurement or inducement of a breach of contract: it can cover a case where the third person prevents or hinders one party from performing his duties even though this is not a breach.

Secondly, the defendant must be shown to have knowledge of the relevant contract.

Thirdly, he must be shown to have had intent to interfere with it.

Fourthly, in bringing an action, other than *quia timet* action the plaintiff must show that he has suffered special damage, that is more than nominal damage; see *Rookes v. Barnab* [1964] AC 1129, 1212, per Lord Devlin.

In *quia timet* action, the plaintiff must show the likelihood of damage to him resulting if the act of interference is successful; *Emerald Construction Company Limited v. Lewthian* [1966] 1 WLR 691, 703, per Diplock LJ.

Fifthly, so far as it is necessary the plaintiff must successfully rebut any defence based on justification which the defendant may put forward.

Raja Aziz next referred to *Thomson & Co Ltd v. Deakin* [1952] Ch 646, 679, 681 where it was held *inter alia* that:

apart from a conspiracy to injure, which was not in question here, acts of third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they are done with the object and intent of bringing about such breach. The tort of procuring a breach of contract however is not confined to direct intervention. The intervener knowing of the existence of a contract between A and B and acting with the object of procuring its breach by A to the damage of B will be liable not only (1) if he intervenes by persuading A to break it, but also (2) if he intervenes by the commission of some act wrongful in itself so as to prevent A from in fact performing his contract and also (3) if he persuades a third party to do an act in itself wrongful or not legitimate (as committing a breach of a contract of service with A) so as to render, as was intended, impossible A's performance of his contract with B.

Referring next to a passage at p. 681 which reads:

> I come then to such formulation of the result as seems to me to be correct; but I should first add this. The argument that this tort should be confined to such direct intervention or interference as is illustrated, for example, in *Lumley v. Gye* introduces this strange difficulty. A limited company, a *persona ficta*, can only act through agents or servants. If the intervention has to be of so direct a kind, it would obviously create strange problems in the case of a limited liability company. No doubt, if I approach some person in the company who has authority on the company's behalf to make contracts, I may be said to be approaching the company direct. I think that the illustration of the company emphasizes the anomaly which would result if, in the case of a limited company, a tortious act were only

committed if the person approached or induced had a particular office or responsibility (actual or perhaps ostensible) in the company.

(emphasis added)

[37] Therefore, was it wrong for the third defendant to issue a Form F1 instead of Form F. I am of the opinion that the third defendant is entitled to issue a Form F1 in accordance with its duties under the Street, Drainage and Building Act 1974, Selangor Uniform Building By-Laws 1986 (UUKBS 1986).

[38] I reproduce by-laws. 25, 27, 28 of the UUKBS 1986 for ease of convenience:

25. Perakuan kelayakan menduduki

(1) Perakuan kelayakan menduduki sesuatu bangunan hendaklah diberi jika;

(a) Orang-orang berkelayakan semasa kerja itu dijalankan telah memperakui dalam Borang E sebagaimana dinyatakan dalam Jadual Kedua Undang-Undang Kecil ini bahawa mereka telah mengawasi pembinaan bangunan itu, dan sepanjang pengetahuan dan kepercayaan mereka bangunan itu telah dibina mengikut Undang-Undang Kecil ini dan apa-apa syarat yang dikenakan oleh pihak berkuasa tempatan dan mereka bersetuju menerima tanggungjawab sepenuhnya mengenai bahagian-bahagian yang berkaitan dengan mereka masing-masing dan pihak berkuasa tempatan atau seorang pegawai yang diberi kuasa secara bertulis olehnya bagi maksud itu telah memeriksa bangunan itu;

(b) Semua perkhidmatan peritermasuk jalan akses, pandang darat, tempat letak kereta, parit, pemasangan alat-alat kebersihan, air dan elektrik, lif bomba, pili bomba dan lain-lain jika dikehendaki, kehendak-kehendak pembetungan dan pembuangan sampah telah disediakan.

(2) Tiada apa-apa pun yang terkandung dalam Undang-Undang Kecil ini boleh mencegah pihak berkuasa tempatan atau mana-mana pegawai yang diberi kuasa secara bertulis olehnya bagi maksud itu daripada memeriksa apa-apa kerja bangunan pada mana-mana peringkatnya dan menarik perhatian kepada apa-apa penyimpangan daripada pelan yang diluluskan atau tidak mematuhi mana-mana undang-undang kecil ini yang didapatinya dan daripada memberi notis secara bertulis memerintahkan supaya penyimpangan

27. Perakuan kelayakan menduduki sebahagian

(1) Pihak berkuasa tempatan boleh mengikut budi bicaranya memberi suatu perakuan kelayakan menduduki sebahagian bagi mana-mana bahagian bangunan yang telah siap sebahagian dan boleh mengenakan apa-apa syarat yang difikirkannya perlu bagi kekentingan awam. Dengan syarat bahawa tiada sesuatu permit sedemikian boleh diberi jika:

(a) tiada apa-apa permohonan bagi perakuan kelayakan menduduki sebahagian telah dibuat dalam tempoh pembinaan itu;

(b) semua perkhidmatan perlu, termasuk jalan akses, pandangan darat, tempat letak kereta, parit, pemasangan alat-alat kebersihan, air dan elektrik, lif bomba, pili bomba dan lain-lain jika dikehendaki, kehendak- kehendak pembetungan dan pembuangan sampah belum disediakan, dan

(c) pendudukan bahagian atau bahagian-bahagian bangunan yang telah siap sebahagiannya itu akan memudaratkan kesihatan atau keselamatan awam.

(2) Suatu perakuan kelayakan menduduki sebahagian apabila dikeluarkan hendaklah berkuatkuasa berterusan sehingga keseluruhan bangunan itu siap dan suatu perakuan kelayakan menduduki dikeluarkan.

Tiada seorang pun boleh menduduki atau membenarkan diduduki mana-mana bangunan atau mana-mana bahagiannya melainkan jika suatu perakuan kelayakan menduduki: suatu perakuan kelayakan menduduki sebahagian atau suatu kelayakan menduduk sementara telah dikeluarkan di bawah Undang-Undang Kecil Ini bagi bangunan du dan apa-apa kemungkiran untuk mematuhi Undang-Undang Kecil ini boleh menyebabkan orang itu kena didakwa di bawah Akta ini.

28. Kesalahan

(1) Jika orang utama yang mengemukakan gagal mendepositkan suatu salinan perakuan siap dan pematuhan atau perakuan siap dan pematuhan sebahagian, mengikut mana-mana yang berkenaan, dan Borang G1 hingga G21 dalam tempoh yang dinyatakan dalam perenggan 25(3) dengan pihak berkuasa tempatan dan Lembaga Arkitek Malaysia atau Lembaga Jurutera Malaysia, mengikut manamana yang berkenaan, dia melakukan suatu kesalahan.

(2) Jika orang utama yang mengemukakan atau orang yang mengemukakan gagal mematuhi notis yang dikeluarkan oleh pihak berkuasa tempatan berkenaan dengan pembetulan apa-apa kemungkiran kepada bangunan atau ketidakpatuhan dengan undang-undang Kecil ini mengikut perenggan 25(4), dia melakukan kesalahan.

(emphasis added)

[39] The said defendant has produced the said Form F1 in exh. SAS-1 dated 8 June 2018. The said Form F1 was issued by the said defendant as tower 1 was fully completed and vacant possession of the units in the said tower could be delivered to the respective buyers.

[40] I find that the said defendant has produced the required Forms G1 to G21 and all supporting documents in exh. SAS-3. I find that the third defendant has shown that the said Form F1 was issued in accordance with statutory provisions and that they had acted lawfully in accordance with their obligations under the relevant statutory provisions. It is not for the plaintiffs to dictate the required form that should be issued by the architect, the third defendant, as that would be contrary to the statute and defeat the purpose of having him to exercise his duties to ensure that the project is safe and sound for occupation by the intended purchasers.

[41] On the pleaded case, I cannot find any form of wrong undertaken by the third defendant that merits a claim for the tort of unlawful interference with contract as alleged by the plaintiffs. The said defendant had acted in

accordance with the applicable law. Such "acts of third party lawful in themselves do not constitute an actionable interference with contractual rights merely because they bring about a breach of contract".

[42] Therefore, I find that the plaintiffs' claim against the third defendant should be struck out as it is a plainly unsustainable case, it is frivolous and constitutes an abuse of process.

The Application To Strike Out By The First Defendant – Enclosure 16

[43] The first defendant has also sought to strike out the claim filed by the plaintiffs against it. I will deal with the first defendant's application solely against the other plaintiffs save those mentioned in para. 21 earlier.

[44] The first basis of the claim filed by the plaintiffs lies on their belief that the term for the delivery of the contract should be 36 months instead of 54 months relying on the decision of the Federal Court in *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* (*supra*).

[45] However, it must be noted that the sale and purchase agreements had incorporated an extension of time of 54 months at the time the said agreement was executed with the approval of the Housing Controller in accordance with reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989.

[46] The housing controller had granted the amendment to the said agreement even before the said contract was concluded with any of the purchasers as seen in exh. N-4, the letter dated 20 June 2012.

[47] I refer to the decision of Mohd Nazlan Ghazali J in *Alpine Return Sdn Bhd v. Matthew Ng Hock Sing & Ors* [2022] 1 CLJ 120, where His Lordship explained the application of the decision of the Federal Court in similar circumstances as those in our present case.

[48] His Lordship stated:

> [42] Secondly, and not unrelated to the above, is that the defendants at the material time – even prior to the execution of the SPAs – were equally fully cognisant that the delivery of vacant possession of the parcels and the completion of common facilities for the project would be 60 months from the date of the SPAs. They had never expected, on the basis of the SPAs (inclusive of the terms on the purchase price, as discounted and granted rebate) receiving the delivery of vacant possession of the parcels together with the completed common facilities of Residensi Star within 36 months. The defendants had also never raised any objections towards the extension, such as after the first 36 months had lapsed, until after the decision in *Ang Ming Lee*, post the delivery of vacant possession by the plaintiff.
>
> [43] In contrast, the purchasers in *Ang Ming Lee* were not told that after the execution of the agreements with the purchasers, the developer applied for an extension beyond the 36-month period originally stated in

the agreements. The purchasers in that case were clearly denied the right to be heard prior to the developer pursuing the unilateral amendment which had been approved by the Ministry.

[44] There is one other distinction which I accept for present purposes is less significant. Unlike in *Ang Ming Lee* where the extension was granted by the Minister on an appeal pursuant to reg. 12 of the Regulations, the extension in the instant case was granted by the Housing Controller under reg. 11(3) of the Regulations 1989. There was no appeal here.

[45] However, in *Ang Ming Lee*, although the extension of time was granted by the Minister on appeal, the letter of extension of time was in fact signed by the Housing Controller and not the Minister. This was found to have been erroneous and the Federal Court held that in an appeal under reg. 12, only the Minister could issue the letter of extension and not the Housing Controller. As such, in the instant case, unlike in *Ang Ming Lee*, there is no irregularity as to which party signed and issued the extension under reg. 11(3) of the Regulations.

[49] His Lordship then considered the plethora of case laws that have been decided by our courts since *Ang Ming Lee* and concluded:

[76] However, I am also mindful that the key consideration in *Ang Ming Lee* on the need of the purchasers as the aggrieved parties who needed the protection from the court is absent and irrelevant in the instant case. Here, both the plaintiff and the defendants were under the assumption that the extension letter was valid, not void or illegal when they executed the SPAs at that material time. The plaintiff had proceeded on and relied on the conduct of the purchasers, including the defendants and was of the belief that the time to deliver the vacant possession were agreed to be extended to 60 months and as such accordingly agreed to sell the parcels to the purchasers. As I have stated earlier, the plaintiff would never have otherwise agreed to sell the parcels to the purchasers at the agreed purchase price (discounted and with rebates) and to commence the construction works of the project. In fact, it would not be wrong to state that at all material times the plaintiff had acted as a responsible developer in making the application to amend the construction period of 36 months to 60 months in Schedule H before entering into the SPAs with the purchasers, including the defendants. There is also absolutely no ambiguity in the language of cl. 25 and cl. 27 of the SPAs.

[77] There was nothing untoward in the application for the extension which was supported by the experts and consultants for the project. The procedures to apply for the extension is governed by the Ministry. At all material times, the plaintiff was merely complying with the procedures of the Ministry and the law as then prevailing including in reg. 11(3) of the Regulations. Crucially in my view, there is no suggestion let alone evidence that the plaintiff at any material time had engaged in any illegality in the making of the application for the extension then.

A [78] In contrast, in the other cases, there were elements of irregularity and illegality – on the part of the developers. In *Ang Ming Lee*, *Alvin Leong* and *Kok Chay Har* for examples, applications for extension of time were made and approved after the relevant agreements had been signed with the purchasers without giving them the right to be heard on the extensions.

B [79] In *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720 the developer was found to have deviated from the provisions of the HDA and the Regulations by modifying the standard statutory form of the sale and purchase agreement without a certificate of the Housing Controller approving the modification. The developer was ruled to have breached the HDA and the Regulations. The Court of C Appeal held that the purchasers would be entitled to enforce their rights as if the agreements had been in its prescribed form without any amendment, and to hold the developer to the terms prescribed by Schedule G of the Regulations.

[80] In an important observation, the Court of Appeal also stated that D having exercised the right to claim for liquidated damages for late delivery, the purchasers cannot be said to be estopped from pursuing their other rights under the agreements in a case where that right had been unlawfully taken away from them in breach of the HDA and the Regulations. It was emphasised that the intention of Parliament was clearly to prevent purchasers who may not be fully aware of their rights E to be exploited by developers to the purchasers' detriment.

[81] It is noteworthy that in *Loh Tina* too, the Court of Appeal held that the doctrine of unjust enrichment does not apply when the Regulations compels compliance with the statutory standard form of the agreement and the developer fails to follow such statutory standard. No similar allegation can be levelled against the plaintiff in this case before me. F

[82] The Court of Appeal in *Loh Tina* observed that the only way the developer could modify or amend the contract of sale in Schedule G was by securing the certificate from the Housing Controller and satisfied the circumstances as specified under reg. 11(3) of the Regulations. In *Loh Tina*, the developer was fully aware of such requirement but yet failed to G comply. The situation in the instant case is different.

[50] Therefore, similarly in this case, as the first defendant did obtain the certificate pursuant to reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989, before the said sale and purchase agreements were executed by the plaintiffs, it cannot be said that the legal position in *Ang* H *Ming Lee* is applicable to the facts of this case. I adopt, wholeheartedly, the position taken by my learned brother Mohd Nazlan Ghazali J in the above-cited case. The plaintiffs cannot claim that the extended time frame as agreed under the sale and purchase agreement, that was made in accordance with the earlier referred regulation is unlawful and not applicable to them. Simply I put, the time frame for delivery is 54 months as provided in cl. 25 of the said sale and purchase agreement. Again, to reiterate, this was made in accordance with reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989.

[51] Now, I deal with the second issue of whether the purchasers save those stated in para. 21, are entitled to claim further liquidated ascertained damages pursuant to the position of law laid down by the Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*). A

[52] This court is bound by the above-referred decision of the Federal Court where the court, *inter alia*, held that "where there is a delay in the delivery of vacant possession by a developer to the purchaser in respect of scheduled contracts under reg. 11(1) of the HDR enacted pursuant to s. 24 of the HDA, the date for calculation of LAD begins from the date of payment of deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase and not from the date of the sale and purchase agreement". B C

[53] However, I find that the plaintiffs and the defendants had earlier entered into settlement agreements as laid down in para. 13 of the affidavit in support of the first defendant and exhibited collectively as exh. N-2. D

[54] The plaintiffs' counsel contends that as the Housing Development Act is social legislation, it would be wrong for the first defendant to rely on the settlement agreement and that the plaintiffs are still entitled to claim for liquidated damages based on the decision of the Federal Court. He also contends that the said decision has retrospective effect and therefore the plaintiffs are entitled to reopen the issue and claim further liquidated damages irrespective of the settlement agreed with the first defendant earlier. E

[55] The plaintiffs' counsel then refers to the decision of my learned brother Quay Chew Soon JC in *Leong Keng Chiang v. Prema Bonanza Sdn Bhd* [2021] 1 LNS 659; [2021] MLJU 714. This decision however is inconsistent with the position adopted by Wong Kian Kheong J in *Pinpoint Consortium (M) Sdn Bhd v. Mammoth Empire Land Sdn Bhd* [2020] 5 CLJ 281 and Mohd Firuz Jaffril J in *Obata Ambak Holdings Sdn Bhd v. Prema Bonanza Sdn Bhd & Other Cases* [2021] 10 CLJ 596. F G

[56] Wong Kian Kheong J in *Pinpoint Consortium (M) Sdn Bhd v Mammoth Empire Land Sdn Bhd* (*supra*) held:

> [16] **I am of the view that housing developers and home buyers may enter into settlement agreements to settle any dispute arising from SPA concerning housing accommodation. The reasons for this view are as follows**: H
>
> (i) housing developers and home buyers have the freedom of contract to enter into settlement agreements regarding housing accommodation (please see the judgment of Gopal Sri Ram FCJ in the Federal Court in *Berjaya Times Squares Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, at para. [10]). Such a freedom can only be restricted or abrogated by clear words of written law; I

(ii) settlement agreements are valid under s. 64 CA. I reproduce below the relevant part of s. 64 CA:

...

(iii) there is nothing in HDA and HDR which invalidates a settlement agreement concluded under s. 64 of the CA. Nor is there any provision in HDA and HDR which requires the controller to approve or consent to the settlement agreement before the settlement agreement can take effect. Regulation 11(3) of the HDR does not invalidate any SPA between a housing developer and home buyer, let alone a settlement agreement. I reproduce below reg. 11(3) of the HDR:

> Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the [SPA] is impracticable or unnecessary, he may, be certificate in writing waive or modify such provisions:
>
> > Provided that no such waiver or modification shall be approved if such application is made after the expiry of time stipulated for the handing over of [VP] under the [SPA] or after the validity of any extension of time, if any, granted by the Controller. (emphasis added)

Regulation 11(3) of the HDR only concerns the controller's power to waive or modify any provision in SPA provided that any one of the conditions stated in reg. 11(3) of the HDR (subject to the proviso to reg. 11(3) of the HDR) is satisfied. There is nothing in reg. 11(3) of the HDR which requires the controller's approval of or consent to a settlement agreement before the settlement agreement can be effective;

(iv) with effect from 1 December 2002, by way of Housing Developers (Control and Licensing) (Amendment) Act 2002 (Act A1142), Parliament has introduced, among others, a new Part VI (ss. 16A to 16AI) regarding "Tribunal for Homebuyer Claims" (tribunal). Sections 16T(1), (2), (3) and 16AB(a) of the HDA provide specifically for settlement agreements between housing developers and home buyers. Sections 16T and 16AB of the HDA provide as follows:

> Negotiation for settlement.
>
> 16T (1) The Tribunal shall, as regards every claim within its jurisdiction, assess whether, in all the circumstances, it is appropriate for the Tribunal to assist the parties to negotiate an agreed settlement in relation to the claim.
>
> (2) Without limiting the generality of subsection (1), in making an assessment the Tribunal shall have regard to any factors that, in the opinion of the Tribunal, are likely to impair the ability of either or both of the parties to negotiate an agreed settlement.

(3) Where the parties reach an agreed settlement, the Tribunal shall approve and record the settlement and the settlement shall then take effect as if it were an award of the Tribunal.

(4) Where:

(a) it appears to the Tribunal that it would not be appropriate for it to assist the parties to negotiate an agreed settlement in relation to the claim; or

(b) the parties are unable to reach an agreed settlement in relation to the claim, the Tribunal shall proceed to determine the dispute.

Orders and settlement to be recorded in writing.

16AB The Tribunal shall make or cause to be made a written record of the terms of:

(a) every agreed settlement reached by the parties under subsection 16T(3) ;... (emphasis added).

If the tribunal can record settlement agreements under ss. 16T(3) and 16AB(a) of the HDA, settlement agreements cannot be invalid under HDA or HDR;

(v) there is a rebuttable statutory presumption that Parliament is deemed to know existing law (please see Gopal Sri Ram JCA's (as he then was) judgment in the Court of Appeal case of *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at p. 754). When the Legislature passed HDA (in 1966) and subsequent amendments to HDA (subsequent amendments), the Legislature is deemed to know about the existing s. 64 of the CA. If Parliament had intended HDA to override s. 64 of the CA regarding settlement agreements, Parliament would have expressly done so when Parliament passed HDA and subsequent amendments. Parliament however did not do so. On the contrary, Parliament has passed A1142 which provides for the tribunal to assist in the negotiation of a settlement agreement and to record such an agreement. It is therefore clear that the Legislature has not intended for HDA to invalidate settlement agreements between housing developers and home buyers;

(vi) in the Court of Appeal case of *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252, at paras. [23]-[25] and [30], Mohamad Ariff Yusof JCA has recognised the validity of a settlement agreement between a housing developer and home buyer as follows:

[23] In our view, the substance of the appeal turned on the validity of the settlement agreement. It seemed to us obvious on the evidence that the respondents (especially the first respondent) had expressly agreed to waive the LAD claimable under the SPA. It could not be said this waiver was a mere

A suggestion. Why would the respondents execute the settlement agreement except to agree to waive the earlier LAD and to accept the new completion date? ...

[24] On the law, the signing of the settlement agreement would fall within the terms of s. 64 [CA] which deals with the B "dispensation" of a promise made to a promisee: ...

[25] The appellant's claim could only be defeated if the settlement agreement was illegal and flouted s. 24 [CA], as either an agreement forbidden by law, or of such a nature as would defeat any law, or would be opposed to public policy. In this appeal, the respondents took a firm view on the effect of C the [HDA] and reg. 11(1) [HDR], in effect arguing that the LAD provision in the Schedule G standard form SPA could not be contracted out ...

...

D [30] ... In terms of policy, there should be nothing illegal in law for a Settlement Agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD E on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist. (emphasis added).

F As a matter of stare decisis, the Court of Appeal's decision in *Oxbridge Height* (*supra*) is binding on this court; and

(vii) it is in the public interest for the law to recognise the validity of settlement agreements. Through amicable settlements, all disputes regarding SPA's of housing accommodation may be finally, G expeditiously and economically disposed. Needless to say, if disputes regarding SPA's of housing accommodation are amicably resolved by way of settlements agreements, the courts will not be burdened with these disputes.

[17] Section 24 CA provides as follows:

H What considerations and objects are lawful, and what not.

24. The consideration or object of an agreement is lawful, unless:

(a) it is forbidden by a law;

(b) it is of such a nature that, if permitted, it would defeat any law; I

(c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (emphasis added).

In view of the reasons explained in the above para. 16, it is clear that SA is not illegal and void under s. 24(a), (b) and (e) of the CA.

[18] It is to be noted that the SA is a new agreement to settle the claimed sum. Accordingly, the SA does not constitute an attempt to contract out of HDA and HDR.

[19] I should add that none of the cases cited by the plaintiff have decided that a settlement agreement between a housing developer and home buyer of housing accommodation is invalid under HDA and HDR.

[57] I also find that my learned brother Mohd Firuz Jaffril J had also taken a similar approach in *Obata Ambak Holdings Sdn Bhd* (*supra*):

[62] The plaintiffs' counsel cited the case of *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252 to argue that the LAD provision in the SPA has a statutory force of law and cannot be contracted out.

[63] Contrary to the observations of the plaintiffs' counsel, Ariff Yusoff JCA in the case of *Oxbridge Heights* (*supra*) referring to s. 64 of the Contracts Act 1950, affirmed the settlement agreement entered into between the developer and the purchaser. The court proceeded on the basis that there is no full contracting out of the LAD provision in the SPA and that the National Housing Department (JPN) was brought into the picture and kept fully appraised of the status of the housing project and the settlement agreement:

... Thus, even in the settlement agreement there was no total contracting out of the LAD provision in the SPA. If delivery of vacant possession had not been delivered by the new completion date, the respondents would have been at liberty to sue on the basis of the original LAD provision. We therefore found that on the peculiar facts of this appeal, there was no full contracting out and no situation where the purpose of the housing legislation being "to protect the weak against the strong" was ousted. In terms of policy, there should be nothing illegal in law for a Settlement Agreement to be negotiated with the full participation and direction from JPN with a view to save a failing housing project from being an abandoned project. It will be in the public interest, and in the interest of house buyers, if the law allowed a regulated settlement and waiver of LAD on terms as specified in the settlement agreement which was the subject matter of this appeal. It was therefore not right and proper for the respondents, despite their promise to conditionally waive LAD under the SPA, to resile from their promise and sue for late delivery under the SPA as if the settlement agreement did not exist.

[64] Similarly in the present case, I am of the view that there is no full contracting out of the signed SPA given that the plaintiffs were entitled to, if not had been duly compensated based on the terms of the signed

SPAs. It cannot be said that the settlement agreements are of no legal effect on the basis that they diminished or took away the statutory rights of the house buyers.

[65] Having reviewed the submissions of both parties, I am of the view that the difference between the case of *Oxbridge Heights* (*supra*) and that in *Hedgeford Sdn Bhd* (*supra*) is negligible as this court only has to consider whether there is a presence of an evidence that the plaintiffs had agreed to accept the amount offered as the full and final settlement in respect of their rights. A "regulated settlement" of the Oxbridge type is only advisable but not necessary.

[58] Having had the opportunity to consider the decisions of the High Court, I find the decision of Wong Kian Kheong J and Mohd Firuz Jaffril J to be persuasive and I agree with the position adopted by them in the above-referred cases. I, therefore, find that the settlement agreement executed by the plaintiffs and the first defendant is binding on parties and, therefore, bars the plaintiffs from making any further claims relating to the late delivery of the said units.

[59] I also stress, despite the danger of repetition, counsel for the plaintiffs conceded that vacant possession of the units bought were delivered to his clients. He, however, argues that as a result of the alleged Form F1, his clients are entitled to reopen the issue and claim further liquidated ascertained damages up to the date when the architect issues Form F.

[60] Learned counsel ably argues that the sale and purchase agreement only allows vacant possession to be delivered when the certificate of completion and compliance ("CCC") was issued by the architect certifying that the building has been constructed and completed in conformity with the approved plans. This is seen in cl. 26 of the sale and purchase agreement.

[61] He further argues that the Housing Development (Control and Licensing) Act 1966, only recognises Form F as being an acceptable CCC and that Form F1 only confirms that there was partial completion of the project. He supports his arguments by referring to s. 3 of the Housing Development (Control and Licensing) Act 1966 which defines CCC to not include a partial certificate of completion and compliance.

[62] Further to the above, learned counsel for the plaintiffs' also points to the decision of the Federal Court in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* (*supra*) where Tengku Maimun Tuan Mat CJ held:

[101] Reverting to the principles of interpretation of social legislation, the court is required to construe the statutory contract in a manner most favourable to the purchasers. It is clear that the sale and purchase agreements only refer to one type of certification namely, the CCC. Further, if we were to apply logical reasoning, a developer is only entitled, pursuant to cl. 27(1)(a) of the sale and purchase agreement, to deliver

vacant possession to the purchasers upon the issuance of the CCC. We cannot fathom why the drafters of the legislation would have intended to apply one standard in respect of vacant possession and another standard in respect of the completion of common facilities. **Thus, absent of clear legislation or written words to the effect that the certification of an architect means anything other than the CCC, we are not prepared to accept the submissions of the developer**.

(emphasis added)

[63] Although, I agree with the arguments raised by the plaintiffs' counsel that a developer is only entitled to deliver vacant possession when a CCC is issued and not when there is a partial completion. However, I find that the documents produced in the affidavits indicate that vacant possession was delivered to the plaintiffs by the first defendant.

[64] Firstly, the plaintiff's own pleaded case, in particular Annexure A, clearly indicates that all the 19 plaintiffs had received notice of vacant possession on 2 July 2018. The plaintiffs admit that vacant possession was delivered on the said, date and this was confirmed by counsel during the hearing.

[65] I also find that, although the third defendant had issued a Form F1 as seen in exh. N-3, the contents of the said form indicate that the whole of Tower-1 was ready for delivery for vacant possession. Clause 26(1) of the sale and purchase agreement is reproduced herein for ease of convenience:

26. Manner of delivery of vacant possession

(1) The Vendor shall let the Purchaser into possession of the said Parcel upon the following:

(a) the issuance of a certificate of completion and compliance certifying that the said Building has been duly constructed and completed in conformity with the approved plans and the requirements of the Street, Drainage and Building Act 1974 and any by-laws made thereunder;

(b) water and electricity supply are ready for connection to the said Parcel; and

(c) the Purchaser having paid all monies payable under sub-clause 4 in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement.

(emphasis added)

[66] As I have said earlier, a developer can only deliver vacant possession of the parcel or unit, among others, at the point the architect responsible has issued a certificate of completion and compliance certifying that the building has been duly constructed and completed in accordance with the Street, Drainage and Building Act 1974 and the certificate must be issued in accordance with by-laws 25, 27, 28 of the UUKBS 1986. These provisions can be seen in para. 38 earlier.

[67] I find that what is important is that the principal submitting person, *ie*, the architect in question (the third defendant), must certify (i) that all the technical conditions imposed by the local authority have been complied with, (ii) forms G1 to G21 has been duly received by him and duly certified, (iii) all electrical services, access roads and all requirements thereunder have been provided and (iv) he certifies that the building has been constructed and completed to the best of his knowledge in accordance with the Act, applicable laws and the approved plans.

[68] To determine this, I must ascertain not merely on the title of the form but also whether the first defendant has shown that all of the requirements of by-laws 25 to 28 of UUKBS 1986 and cl. 26 of the sale and purchase agreements are fulfilled.

[69] After considering the documents shown in the affidavit, I find that the first defendant has shown that, although the title to the form used is FORM F1, the architect has certified that Menara Tower 1 was built in accordance with the requirements of by-laws 25 to 28 of the UUBKS 1986. He has certified that the said building is fit and ready for occupation. Forms G1 to G21 were reproduced by the first defendant and the third defendant with all the necessary documents showing water, electricity, and access to the building has been provided on 2 July 2018. Even in the form utilised by the architect, he had indicated that Block Menara 1 (service apartment) 44 Tingkat 319 unit is safe and fit for occupation in accordance with the UUKBS 1986.

[70] My belief is further fortified by the plaintiffs' documents when they made their claims before the housing tribunal. Examples of which were produced in exh. N-7 of the first defendant's affidavit in support. I take an example of the pleading filed before the housing tribunal prepared by Chin Kok Woo, where the purchaser admitted that vacant possession was delivered on 27-2018 and that the common property was also delivered by the first defendant. As a result of which, the said plaintiffs/purchasers were able to claim before the housing tribunal liquidated ascertained damages under the sale and purchase agreements and have since been paid in full.

[71] I am also of the view that vacant possession was provided to the plaintiffs as the Joint Management Body was set up on 25 May 2019, as seen in exh. N-10. This was endorsed by the Sepang Municipal Council in accordance with s. 17 of the Strata Management Act 2013. Section 17 of the Strata Management Act 2013 is reproduced herein:

> (1) A joint management body shall be established upon the convening of the first annual general meeting of that joint management body:
>
> (a) if vacant possession was delivered before the commencement of this Act, not later than twelve months from the commencement of this Act; or

(b) if vacant possession is delivered after the commencement of this Act, not later than twelve months from the date of delivery of vacant possession of a parcel to a purchaser.

If vacant possession was not delivered, the developer is not entitled to set up a Joint Management Body. The local authority would not have allowed such a body to be set up and the duty of the developer to maintain the maintenance account and sinking fund accounts continues under section 11 and section 11 of the Strata Management Act until vacant possession is delivered.

[72] Another important fact that I have taken into consideration is cl. 25(3) of the sale and purchase agreement which states:

For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this Clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel.

[73] Given the said clause, if indeed that vacant possession was not given to the plaintiffs, then they do not have the right to institute any proceedings yet for late delivery. The right for the plaintiffs to institute their claim for liquidated damages only arises when vacant possession is given to them and not before then. As they themselves are now attempting to reopen the issue of late delivery that they had either ventilated before the housing tribunal or had earlier settled, they have surely admitted that vacant possession of the premises or units they bought had been given. They cannot blow hot and cold at the same time.

[74] Therefore, based on the aforesaid, I agree with the first defendant's arguments and that the claim against it should be struck out.

[75] I find that the plaintiffs cannot reopen the issue of liquidated damages again as they have either (i) pursued the claims before the housing tribunals and (ii) that they have settled their claims in full as seen in the settlement agreements executed and shown in the affidavit in support filed by the first defendant.

[76] I am aware that the Housing Development (Control and Licensing) Act is a piece of social legislation and is intended to protect purchasers. However, this does not mean that this court should disregard any settlement agreement that was entered between the plaintiffs and the defendants that was entered into to finalise any liquidated ascertained damages claimed by the said plaintiffs. Such agreements were not specifically prohibited by legislation, and I, therefore, find that the plaintiffs' claims are frivolous and vexatious against the first defendant.

[77] The sword of justice cuts both ways. I am of the opinion that this court should not merely protect purchasers but should also prevent any attempt to reopen litigation that has been either litigated before a competent tribunal or settled amicably.

A **Application To Strikeout By The Second Defendant – Enclosure 22**

[78] I will now deal with the application filed by the second defendant in encl. 22 that also seeks to strike out the claim against it under O. 18 r. 19(a), (b) or (d) of the Rules of Court 2012.

B **[79]** The claim against the second defendant relates to the failure of the said defendant to comply with the terms of the sale and purchase agreement.

[80] After perusing the said sale and purchase agreements, I find that the second defendant is not liable to the plaintiffs for the claims that are instituted in this proceeding. The obligation to deliver the property within the C contractual time frame under the sale and purchase agreement lies with the first defendant and not with the second defendant. I also note that the remedies claimed by the plaintiffs in paras. 87(a), (b), (c), (d), (f) and (g) in this suit are solely against the first defendant. No specific remedy was prayed against the second defendant thus indicating that there is no complete cause D of action against the second defendant.

[81] Furthermore, the first defendant, through Juruukur Usaha, has since applied to have the strata title issued by the relevant authorities as seen in exh. N-2 in the affidavit filed by the second defendant.

E **[82]** Therefore, I find that the plaintiffs do not have a valid cause of action against the second defendant.

[83] Given the above, I am of the opinion that the claim against the second defendant is frivolous, vexatious and is an abuse of the process of this court.

Orders Of This Court

F **[84]** Given the above, I make the following orders:

(i) Claim by P1, P2, P6, P7, P8, P15, P16, P17 & P19 is struck out.

(ii) Enclosure 16 and encl. 20 by the first defendant and second defendant are allowed. Claim against the first and second defendants is struck out G under O. 18 r. 19(b) and (d). Costs of RM5,000 for each application subject to allocator.

(iii) Enclosure 22 by the third defendant is allowed, claim against third defendant is struck out under O. 18 r. 19(b) and (d). Costs of RM10,000 H subject to allocator.

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